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No. 08-125

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. FOIA Exemptions Must be Applied Narrowly to Ensure That the Act's Central Purpose is Fulfilled 3

A. FOIA Provides Broad Access to Federal Agency Documents 3

B. In this Case, this Court can Clarify a Significant Area of FOIA Law 4

II. An Overly Broad Interpretation of FOIA's Exemption 5 Dramatically Hinders Oversight of Federal Agencies 8

A. The Press has Often Used FOIA to Obtain Records Produced by Third Parties Hired by the Government to Assess Government Performance. 8

B. The Public has a Right to Know About the Process and Influences by which the Bush Administration's Illegitimate Military Commissions were Devised 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Dep't of Air Force v. Rose, 425 U.S. 352 (1976) 4

Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) 4-7

Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) 3

Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989) 4

FBI v. Abramson, 456 U.S. 615 (1982) 4

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 11

Nat'l Inst. of Military Justice v. Dep't of Defense, 512 F.3d 677 (D.C. Cir. 2008) 5

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 1

STATUTES AND REGULATIONS

5 U.S.C. § 552(b)(5) 5

Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) 5

OTHER

Christian Lowe, *Flawed Body Armor*, Marine Corps Times, May 16, 2008, at 22 9

Ken Ward, Jr., *Mine Agency Misses 'Systematic' Problems, Study Says*, Charleston Gazette, Nov. 9, 2004, at 1D 9, 10

Todd C. Frankel, *Why did this Cable at the Arch Break?*, St. Louis Post-Dispatch, Aug. 8, 2008, at A1 ..... 8, 9

S. Rep. No. 89-813 (1965) 3

Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 2 Weekly Comp. Pres. Doc. 895 (July 4, 1966) 3

STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act ("FOIA" or "the Act") litigation since 1970.

The Reporters Committee assists journalists in accessing information integral to the public's participation in its government, including access to federal agency records under FOIA. As "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), journalists need unfettered access to all information, including records relating to the influences of outside consultants, that sheds light on government performance. .

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the amicus made a monetary contribution to the preparation and submission of this brief; that counsel for both parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk.

SUMMARY OF ARGUMENT

Congress enacted the Freedom of Information Act to shed light on the inner workings of government and pierce the veil of administrative secrecy that is detrimental to creating a responsive and accountable government. In this case, the Petitioner used FOIA to request records created by non-governmental attorneys who were solicited by the Department of Defense to offer recommendations relating to the creation of military commissions. If disclosed, the attorneys' records would supply unique insight into the formation of military commissions that ultimately led to years of costly litigation and the eventual invalidation of the commissions as they existed in 2006. The lower courts agreed with the government in this case that the requested records could be withheld citing FOIA's Exemption 5. But the lower courts' analyses as to whether the attorneys' communications constituted "inter-agency" or "intra-agency" records is incomplete, because the attorneys' potential self-interests were not sufficiently evaluated. Because this Court has ruled that this type of in-depth analysis is required in Exemption 5 cases, the petition should be granted and the lower court's decision ultimately reversed.

ARGUMENT

I. FOIA EXEMPTIONS MUST BE APPLIED NARROWLY TO ENSURE THAT THE ACT'S CENTRAL PURPOSE IS FULFILLED.

A. FOIA Provides Broad Access to Federal Agency Documents.

The Freedom of Information Act was designed to facilitate the public's ability to monitor and evaluate federal agencies. As Congress noted when the Act was created, FOIA's purpose is "to establish a general philosophy of full agency disclosure." S. Rep. No. 89-813, at 38 (1965). In signing the bill into law, President Lyndon Johnson noted that a democracy works best when the public is privy to more information concerning its government rather than less: "No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest." Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 2 Weekly Comp. Pres. Doc. 895 (July 4, 1966).

During the more than forty years since FOIA's enactment, this Court has repeatedly recognized that Congress intended the Act to be an instrument for shedding light on the federal government's performance. *See, e.g., Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989). In fulfilling this central purpose of showing what the "government is up to," the Act must be construed broadly in favor of disclosure. *Id.* at 773. More spe-

cifically, the Court has viewed FOIA as a tool for holding the government accountable by dissolving the walls of secrecy. As the Court noted, FOIA was enacted to "[t]o make clear the congressional objective ... to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361(1976) (*internal quotations omitted*).

To serve the Act's overriding interest in providing broad access to government documents, this Court has acknowledged that FOIA's exemptions must be interpreted narrowly. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) (citing *Rose* at 425 U.S. at 361 (holding that exemptions are "limited"); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (recognizing that given FOIA's "goal of broad disclosure, these exemptions have been consistently given a narrow compass"); and *FBI v. Abramson*, 456 U.S. 615, 630 (1982) (finding that "FOIA exemptions are to be narrowly construed)). This Court has recognized that FOIA was originally conceived to default in favor of disclosure. As it noted in *Rose*, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." 425 U.S. at 361.

B. In this Case, this Court can Clarify a Significant Area of Freedom of Information Act Law.

The Act's Exemption 5 permits federal agencies to withhold "interagency or intra-agency memoranda or

letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify for the exemption, the records must also be deliberative and pre-decisional. *Klamath*, 532 U.S. at 8-9. In *Klamath*, this Court found that letters submitted by Indian tribes to the Department of the Interior were not exempt from disclosure because the tribes had been acting explicitly in their own interests in filing the letters. *Id.* at 14. This Court expressly declined to rule whether Exemption 5 might apply to reports produced by third-party consultants in other circumstances. *Id.* at 12.

In this case, Petitioner seeks to obtain through FOIA records of communications between Department of Defense ("DoD") personnel and members of the public relating to the Military Order ("the Order") signed by President Bush on November 13, 2001. *Nat'l Inst. of Military Justice v. Dep't of Defense*, 512 F.3d 677, 678-79 (D.C. Cir. 2008); Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). The Order authorized the establishment of military commissions to try suspected terrorists. *Id.* Petitioner has also requested documents relating to DoD's subsequent implementing orders and regulations related to the Order. *Id.* In rejecting the Petitioner's records request, the DoD claims that the requested records, which feature non-governmental attorneys' opinions and recommendations, may be withheld from disclosure through Exemption 5 because the records qualify as "intra-agency or inter-agency" documents. *Id.* The DoD argues that in the absence of a consultant's clearly identified self-

interest, D.C. Circuit precedent authorizes records with pre-decisional, deliberative content to be withheld through Exemption 5. *Id.*

The D.C. Circuit Court in this case agreed with the DoD and found the records at issue could be withheld through Exemption 5, despite the fact that the attorneys' relationship with the agency was not memorialized through a formal contract and the attorneys are not public officials. *Id.* The circuit court held that *Klamath* did not control the outcome in this case, because the attorneys' interests in soliciting their comments were not identified. *Id.* The lower court instead relied upon its own precedent in finding that records submitted by non-agency parties in response to federal agency requests can be withheld. *Id.* at 681.

The Petitioner has conceded and the circuit court has found that there is no persuasive evidence that the non-governmental attorneys in this case were motivated by their own personal interests to submit their comments to the DoD. *Id.* at 683. But even if the attorneys' interests were not sufficiently identified to trigger the rule from *Klamath*, neither is it sufficiently clear by the facts in this case that the attorneys' comments were absolutely *not* motivated by their self-interests. *See id.* The lack of a formal, contractual relationship between the DoD and the attorneys, along with the attorneys' status as private citizens rather than as public officials makes it inherently difficult to discern what, if any, interests the attorneys may have represented.

D.C. Circuit Court Judge David S. Tatel's dissent acknowledged this key point in arguing that the majority has in essence ignored the analysis of potential interests that this Court instituted through *Klamath*. As Judge Tatel noted, the majority has seemingly adopted a rule for Exemption 5 cases that views "intra-agency" as a "purely conclusory term." *Id.* at 690-91 (Tatel, J., dissenting) (citing *Klamath*, 532 U.S. at 12). Without a more in-depth analysis of a given consultant's potential interests, the circuit court's rule allows an intra-agency or inter-agency "label to be placed on any document the Government would find it valuable to keep confidential." *Id.*

In granting this petition, the Court has an opportunity to clarify the reach of Exemption 5, and, most importantly, correct the D.C. Circuit's rule, which injects a degree of ambiguity into what constitutes an intra-agency or inter-agency communication that is inconsistent with both the *Klamath* decision and Congress' intent for broad disclosure under FOIA. *See supra* Part I.A. If the circuit court's rule on this issue is permitted to stand, federal agencies will continue to withhold documents with little or no regard for the potentially significant interests represented by the private citizens by whom agencies can be influenced. This Court should make clear the narrow circumstances by which Exemption 5 may be applied and, in so doing, ensure that such records are available for public scrutiny.

II. AN OVERLY BROAD INTERPRETATION OF FOIA'S EXEMPTION 5 DRAMATICALLY HINDERS OVERSIGHT OF FEDERAL AGENCIES.

A. The Press has Often Used FOIA to Obtain Records Produced by Third Parties Hired by the Government to Assess Government Performance.

A crucial function of the press is to maintain a close eye on government decision-making, taking care to scrutinize the process by which public officials spend taxpayers' money and act on the public's behalf. In fulfilling this watchdog role, the press is often dependent on FOIA as an invaluable tool to uncover government waste, corruption, and ineptitude. Because such transgressions often leave a paper trail, the public is better served when the press has full, unobstructed access to government documents.

In many cases, this paper trail begins with the work of third-party consultants who have either been hired by the federal agencies to assess government performance or who have been solicited without compensation to provide expertise and insight to government decision makers. In their own investigations, reporters routinely depend upon the objective analysis provided by such consultants.

For example, the *St. Louis Post-Dispatch* recently used FOIA to obtain an independent contractor's report that found the National Park Service ("NPS") to be partly at fault for a tram cable that snapped within the Gateway Arch in St. Louis. Todd C.

Frankel, *Why did this Cable at the Arch Break?*, St. Louis Post-Dispatch, Aug. 8, 2008, at A1. While no one was injured when the braided steel cable plummeted more than 500 feet within the national historic landmark on July 21, 2007, experts said the falling cable had the potential to cut through metal "like a knife through butter." *Id.* The ensuing investigation culminated in a report produced by a Pennsylvania engineering firm, which found workmanship by the NPS to be partly to blame for the near-disaster. *Id.* While there is no evidence that the NPS attempted to withhold the report or otherwise cover up the report's criticisms, the *Post-Dispatch* report shows the availability of FOIA absolutely ensured the valuable report's public release. *Id.*

In 2005, a newspaper's FOIA request for consultant-produced documents led to one of the more eye-opening and disturbing stories of the current Iraq War. The *Marine Corps Times* used FOIA to obtain an outside consultant's memoranda to the Marine Corps that recommended body armor vests being issued to American soldiers be replaced. Christian Lowe, *Flawed Body Armor*, Marine Corps Times, May 16, 2005, at 22. By obtaining the memoranda, the newspaper showed the Marine Corps had disregarded the recommendations, which were later validated by another government agency, and left American soldiers vulnerable while in combat. *Id.* As a result of the *Marine Corps Times* story, the Marine Corps recalled more than 5,000 of the ineffective body armor vests. *Id.*

In 2004, the *Charleston Gazette* obtained a consultant's report that found U.S. Mine Safety and

Health Administration ("MSHA") officials had been ignoring large scale safety concerns through inadequate mine inspections. Ken Ward, Jr., *Mine Agency Misses 'Systematic' Problems, Study Says*, Charleston Gazette, Nov. 9, 2004, at 1D. The *Gazette* asserted that the agency only released the report that was drafted by a consultant's firm hired by MSHA once the newspaper filed a FOIA request. *Id.*

The examples above are just a brief snapshot of how FOIA has been used to obtain consultants' documents that otherwise might have been locked away from public view. Because the reports and memoranda were all produced by third-party consultants hired by federal agencies for purposes unrelated to the consultants' interests, the reports could have arguably been withheld by applying an overly broad interpretation of FOIA's Exemption 5. The examples above show the public has been better served by a narrow interpretation that leads to disclosure of consultants' documents, thereby permitting journalists to properly perform their important oversight function.

B. The Public has a Right to Know About the Process and Influences by Which the Bush Administration's Illegitimate Military Commissions were Devised.

The Bush Administration's attempts to create fair and just military commissions to try detainees held in Guantanamo Bay, Cuba, were arguably a failure. After years of litigation derived from challenges over the commissions' legitimacy, this Court ruled in

Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that the commissions were unauthorized by federal statutes and violated international law.

Given the tremendous resources that were expended by the federal government to create the military commissions and then defend the commissions' legitimacy through litigation, the American people deserve to know how and why the administration created the commissions in the first place. By withholding the identities and communications of the individuals who may have influenced an outrageously flawed episode of policy making, the DoD has overtly excluded the public from the process, precluding any oversight concerning the commissions and their creation. Furthermore, if such communications are permitted to be withheld, the DoD will have little incentive in the future to avoid the influence of the individuals who may have played a part in creating the failed military commissions.

CONCLUSION

The public has a right to scrutinize the government decisions made in its name, for its benefit and with its tax dollars. As in this case, where the interests and influence of non-governmental consultants are ambiguous and not identified through a formal, contractual relationship, the communications between such consultants and public officials should be disclosed to the public, as Congress intended by enacting FOIA. The petition for a writ of certiorari filed by the National Institute of Military Justice should be granted.

Respectfully submitted,

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